78-1820

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ASSOCIATED THIRD CLASS MAIL USERS,
Petitioner

v.

UNITED STATES POSTAL SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Associated Third Class Mail Users, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-14a) is not yet reported. The Memorandum Opinion of the District Court (App. E, *infra*, pp. 18a-26a), is reported at 440 F. Supp. 1211.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 15a, was entered on March 9, 1979. Petitioner's timely

petition for rehearing and suggestion for rehearing en banc were denied on April 3, 1979 (Apps. C and D, *infra*, pp. 16a, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether identical advertisements directed to specific persons or to specific addresses even with no person named (*e.g.*, "occupant") are "letters" within the meaning of the Private Express Statute.

2. Whether the application of the Private Express Statute to such public advertisements is arbitrary or unreasonable in violation of the due process guarantee of the Fifth Amendment.

3. Whether the application of the Private Express Statute to such public advertisements denies members of Associated Third Class Mail Users equal protection of the law.

4. Whether the application of the Private Express Statute to such public advertisements violates the First Amendment rights of members of Associated Third Class Mail Users to freedom of speech.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the freedom of speech and due process guarantees of the First and Fifth Amendments, respectively, of the United States Constitution. They provide that "Congress shall make no law . . . abridging the freedom of speech" and that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

This case also involves a criminal statute, the Private Express Statute, 18 U.S.C. § 1696, which provides in relevant part as follows:

> "*Private express for letters and packets*
>
> "(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both."

Sections 601-606 of Title 39 U.S.C., civil statutes, contain provisions describing the conditions under which a "letter" may be carried by private delivery companies (*i.e.*, by affixing regular postage and so forth) and authorizing searches for the seizure of mail matter transported in violation of law. These civil provisions do *not* create the postal monopoly. The monopoly is based on the criminal law provisions of Title 18 quoted above.

The relevant provisions of the Regulations under review below, 39 C.F.R. Section 310.1-.7, are reproduced in Appendix F of this petition (pp. 27a-35a).

STATEMENT OF THE CASE

The Postal Service claims that the slip opinions of the United States Supreme Court are "letters" which are subject to the postal monopoly.

John Jones comes home from work. On the hall table is an advertising flyer from Raleighs printed on a newspaper-sized paper folded three times to a 5½ inch by 8½ inch dimension. The flyer is not in an envelope. It has a sticker which says, "John Jones, 5678 P Street, N.W., Washington, D.C. 20008." (Or it might be addressed to "Occupant" or "Householder" at the same address.) Would Mrs. Jones say to her husband: "There's a letter for you from Raleighs on the hall table"? Probably not.

But the Postal Service claims that the Raleighs flyer—sent out in identical form by the thousands or tens of thousands—is a "letter" subject to the postal monopoly. The Postal Service takes this position even though such circulars are "disposed of as waste" "without examination of contents" by the local post office if they are mailed at third class rates, are undeliverable because the address is wrong and there is no guarantee of return postage by the mailer. Postal Service Manual § 159.412.

Petitioner, Associated Third Class Mail Users (ATCMU) does not challenge the Private Express Statute, 18 U.S.C. § 1696, a statute granting the United States Postal Service a monopoly on the delivery of first class letters. ATCMU does not intend or wish to establish a private delivery system, as the District Court seems to have assumed. (400 F. Supp. 1211, 1213, App. E, p. 19a). Recent court cases concerning the validity of the postal monopoly over first class mail, and concerning business enterprises which seek to compete with the Postal Service, have no bearing on the instant action.

ATCMU does challenge the validity of postal regulations extending the Private Express Statute to cover the distribution of *public advertisements*. Public advertisements (such as throwaway advertising flyers) are printed messages to the public directed in identical form to numerous persons or numerous addresses (sometimes hundreds of thousands or millions) without a person being named (*e.g.*, a message directed to "occupant").

Public advertisements, even when bearing or intended for a particular name or address, are directed to the public at large, or to a major segment of the public, with any person being invited to purchase the product or service. These public advertisements may be in the form of throwaway flyers, folders, brochures, single sheets or paper items in other forms. When sent on their own through the mail, they typically bear postage at the bulk

third class rate (either the regular rate or the lower not-for-profit rate, as appropriate). These public advertisements may be enclosed in an envelope, which may be sealed in order to facilitate handling by postal machinery. Sealed envelopes sent at third-class rates may be opened for postal inspection and, therefore, are not accorded privacy as are first-class items.

Bulk third-class mail gets no free forwarding service, no privacy of contents, must comply with elaborate and expensive mailer pre-sorting requirements, cannot use street collection boxes, gets deferred service at the lowest level given to any class or subclass of mail, and may even be disposed of as waste in certain circumstances.

The Postal Service takes the position that addressed public advertisements are "letters" and therefore subject to the postal monopoly and cannot be delivered by private firms without the payment of postage.

The Postal Service contends, for example, that a private delivery company may not (without payment of postage to the government) leave at a house or an apartment or an office a folder, which is identical with hundreds of thousands of other folders, asking for a contribution to the March of Dimes or to the Easter Seal Campaign or advertising a sale at Raleighs if that folder says on it "Occupant, 5678 P Street, N.W., Washington, D.C. 20008." Such folders, like slip opinions of this Court, are considered "letters" by the Postal Service.

By way of contrast, the Postal Service admits that the monopoly does not extend to addressed catalogs, to advertising supplements in newspapers delivered to particular persons, or to advertisements which are distributed at random.

The postal regulation defining public advertisements as "letters," 39 C.F.R. § 310.1-.7 (App. F., pp. 27a-35a), was promulgated on September 16, 1974. On September

21, 1976, ATCMU filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief, under the postal laws of the United States, 18 U.S.C. § 1696 and 39 U.S.C. § 101 *et seq.* The jurisdiction of the District Court rested on 39 U.S.C. § 409(a) (suit against the Postal Service) and 28 U.S.C. § 1339 (postal matters jurisdiction).

The National Association of Letter Carriers (NALC) filed a motion to intervene as a party defendant on December 7, 1976. The District Court granted NALC leave to intervene as a party defendant on January 3, 1977.

Because there were no material facts in dispute, the parties filed cross-motions for summary judgment, and in a Memorandum Opinion and Order dated November 29, 1977, the District Court, Barrington D. Parker, J., denied ATCMU's motion, granted the Postal Service and NALC motions, and entered judgment on behalf of the Postal Service and NALC. 440 F. Supp. 1211 (App. E, pp. 18a-26a).

While the decision of the District Court was being appealed, and before the Court of Appeals could decide the validity of the postal regulation in question, the Postal Service proceeded to propose new regulations "clarifying" the definition of "letter" as including public advertisements. Proposed Private Express Regulations, 43 Fed. Reg. 60615 (1978). The new regulations include even unaddressed public advertisements as "letters" if they are delivered by a "selective delivery plan," *e.g.*, according to a memorized list. *Id.*

Thus the Postal Service now claims that a throwaway unaddressed advertising flyer acquires the standing of a "letter" for postal monopoly purposes because, for example, a delivery boy commits a list of addresses to memory. Yet, the advertisements which will remain exempt from the Postal Service's definitions of "letter"—addressed catalogs, newspaper advertising supplements

and randomly distribution advertisements—are identical in purpose and content to the public advertisements which will be considered to be "letters."

On March 9, 1979, the Court of Appeals (Wilkey, J., dissenting)[1] affirmed the decision of the District Court upholding the validity of the challenged definition of public advertisements as "letters" within the scope of the Private Express Statute.

REASONS FOR GRANTING THE WRIT

1. Contrary to the Postal Service's definitions, public advertisements are not "letters" within the scope of the Private Express Statute. The Postal Service's construction flies in the face of common and ordinary usage. Webster's Dictionary (New International, 3d Ed.) defines "advertisement" as "a *public* notice" (emphasis added). A letter, on the other hand, is defined as "a written or printed message intended for the perusal *only* of the person or organization to whom it is addressed" (emphasis added), or in other words, a *private* message. To be sure, an advertising folder addressed to "Occupant" is intended for the perusal of "Occupant." The majority in the Court of Appeals made much of this poir. (Opinion at 13, App. A, pp. 11a-12a). However, such an advertising folder is not intended for the perusal *only* of "Occupant." It is also intended for the perusal of the public at large. This crucial distinction inherent in the common definition of "letter" was completely ignored by the majority below.

Thus, the definition of "letter" promulgated by the Postal Service is completely at variance with its common and ordinary meaning. Absent a contrary clear expres-

[1] Of the two judges in the majority, one, Flannery, J. (who was not present at the oral argument because of illness), was a District Judge of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

sion of intention, words in a statute must be read in accordance with their common usage. *March* v. *United States*, 165 U.S. App. D.C. 267, 276, 506 F.2d 1306, 1315 (1974) and cases cited therein.

The United States Court of Appeals for the District of Columbia Circuit emphasized this point in *The Lubrizol Corporation* v. *Environmental Protection Agency*, 183 U.S. App. D.C. 288, 562 F.2d 807 (1977):

> "Generally, courts accord statutory language its common sense meaning unless the statute, or its legislative history, require some other reading. . . . 'After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.'" 183 U.S. App. D.C. at 297, 562 F.2d at 816 (citations omitted).

The legislative history of the Private Express Statute does not require a non-common sense meaning of the word "letter," a fact conceded even by the majority (Opinion at 4-6, App. A, pp. 4a-5a). This alone would be sufficient to invalidate the Postal Service's definition of "letter".

However, beyond this, an examination of the language used by Congress in earlier versions of the Private Express Statute offers clear evidence that Congress considered public advertisements not to be "letters."

As the majority in the Court of Appeals noted, "few courts have considered the scope of postal monopoly or the meaning of 'letter.'" (Opinion at 5, App. A, p. 4a). No courts have considered the meaning of the word "letter" in the Private Express Statute in the context of public advertisements. This makes it all the more important for this court to grant certiorari, as this case involves an important federal question of first impression.

Ordinarily, an agency's long-standing interpretation of a statute which it is charged to administer is accorded judicial deference. Here, the Postal Service has demonstrated such lack of consistency in interpreting the definition of "letter" that even the majority in the Court of Appeals called the history of administrative interpretations of the statute a "muddle" (Opinion at 9, App. A, p. 8a). Judge Wilkey (Dissent at 1, App. A, p. 13a) found only one consistent theme in the administrative interpretation of the statute: The Postal Service

> "has always latched onto whatever interpretation of the word 'letter' which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.
>
> ". . . I find this total lack of any intellectual consistency offensive, especially when coming from a supposed-to-be responsible government agency . . ."

Despite all the evidence of administrative bumbling and inconsistency, the majority in the Court of Appeals curtly held (Opinion at 12, App. A, p. 11a) that "whatever ambiguity or inconsistency existed" is not "grounds" to set aside the current administration definition classifying public advertisements as "letters." However, this Court has placed great emphasis on the consistency of administrative interpretations. *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). Additionally, the courts have accorded deference only to those administrative interpretations that show some semblance of being well-reasoned. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). As we have shown above, the Postal Service's interpretation does not measure up to this standard.[2] The inconsistencies and ambiguities in interpretation of the Private Express Statute, as Judge Wilkey found, are the result of 150 years of bureaucratic power grabbing by the

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[2] *See also*, pp. 11-12, *infra*.

Postal Service, which the courts should not countenance. (Dissent at 1, App. A, p. 13a).

This "power grabbing" is a matter of increasing concern. For example, the Federal Communications Commission (FCC) is opposing the Postal Service's proposed regulations (43 Fed. Reg. 60615 (1978)) to extend the private express monopoly to hard copy messages (except telegrams) involving electronic communications. *The Wall Street Journal*, Eastern Edition, March 14, 1979, page 12. This article quotes a letter from the General Counsel of the FCC as saying that the Postal Service proposal would

> "significantly thwart the FCC's recent efforts to stimulate new electronic message services by opening competition in the public message telegraph field, and is likely to increase the cost and reduce the quality and diversity of such services to the public."

Such "power grabbing" is of concern not only because it is outside the scope of statutory authority, and thus illegal, but also because, as the FCC noted above, it results in needless cost and a lack of open competition. ATCMU wishes its members to have an alternative to being a captive audience of the postal corporation. The basic "minimum per piece" postal rate for bulk third class mail has increased 740% since the early 1950's! During that same period the Consumer Price Index (all items-1967=100) has gone up about 170%, a small increase by comparison to the inflationary increases in third class mail rates. It is no wonder that the President has announced that unnecessary regulations are a contributing cause of inflation, and has declared a national policy of ensuring that regulations "do not impose unnecessary costs to the American economy." Material from Presidential Documents, Vol. 14, No. 15, April 17, 1978 at 723-24.

If this Court does not grant the writ, the Postal Service will continue to aggrandize its own power in defining

the extent of the postal monopoly. At a minimum, this Court should remand to the Court of Appeals to consider the impact of its opinion and judgment on the raging controversy over whether the postal monopoly applies to "electronic mail."

2. If construed to include public advertisements, the Private Express Statute is arbitrary and unreasonable in violation of the due process guarantee of the Fifth Amendment.

Here the Postal Service claims that public advertisements that are addressed are "letters" while unaddressed advertisements are not. Using the Postal Service's address criterion, by some bureaucratic legerdemain a public advertisement is transformed into a "letter" by the minor convenience of attaching or stamping an address on the advertisement. Moreover, under proposed regulations, "unaddressed" advertisements *would be considered* "addressed" if delivered according to a "selective delivery plan," *e.g.*, by memorizing a list. 43 Fed. Reg. 60615 (1978).

These determinations are blatantly unreasonable. In one case, where an address label is used, the advertisement is claimed to be a "letter," and in the other case, where there is no address label, it is not. This is an irrelevant detail and an unrelated formality when it comes to determining anything with such significant financial consequences as whether an item is a "letter."

The majority in the Court of Appeals rejected ATCMU's constitutional attack on the postal regulation by referring to the analysis of the District Court. (Opinion at 13-14, App. A, p. 12a). The District Court (440 F. Supp. 1211, 1216, App. E, p. 25a), analyzing this issue in a mere two sentences, upheld the definition of "addressed" public advertisements as "letters" against attack on due process grounds by noting that addressing was *important to ATCMU's advertising goals.*

ATCMU respectfully suggests that both Courts below erred in relying on the significance of addressing *to ATCMU*. The relevant factor in determining the constitutional validity of the classification is not the value of addressing *to ATCMU members*, but rather the reasonableness of using addressing to distinguish subject matter which is within the postal monopoly from that which is not.

An address on a personal letter has a significance which differs from an address on a public advertisement, for in *private*, individualized messages, the name and address are an integral part of and give meaning to the message itself. A letter directed to "Aunt Minnie" is highly personalized and has full meaning to her alone. The arbitrariness of the Postal Service's standard lies in applying this criterion to non-personal messages such as public advertisements which have meaning—and are meant to have meaning—to the public at large independent of an address on an address level.

3. By exempting newspaper advertisements and catalogs from the postal monopoly (as non-"letters") while defining public advertisements as "letters" subject to the postal monopoly, the Postal Service's interpretation of the Private Express Statute denies ATCMU equal protection of the laws under the Fifth Amendment.

Newspaper advertising supplements, sometimes also called free-standing stuffers, are functionally equivalent to advertising circulars delivered alone. These supplements usually are not printed by the newspaper but are merely "stuffed" or folded into the newspaper for delivery. Free-standing stuffers not only have the same text as other advertising circulars (such as those sent through the mails), "they are physically the same product of ink and paper, the only difference being that the address in one instance is imprinted on the outside of the newspaper and in the other instance on the envelope containing only the circular or the circular itself." (Wilkey, J., Dissent at 2, App. A, p. 14a).

Yet according to the Postal Service, of these identical public advertisements, both delivered to specific addresses, one is considered a "letter" and the other is not, merely because the non-"letter" is in physical contact and delivered with a newspaper. As Judge Wilkey points out, there is no valid distinction between the two. The only basis for this discriminatory classification is whether the advertisement is folded into a newspaper. This difference has no relationship to the object of the Private Express Statute, which is to protect the viability and revenue of the United States postal system. If the government has determined that advertisements must be subject to the monopoly in order to protect the postal system, then all advertisements must be so covered, whether or not they are in physical contact with newspapers.

The same may be said for the classification of "catalogs" as non-"letters." A public advertisement can classify as a "catalog" if it consists of at least 24 bound pages. (39 C.F.R. § 310.1(a)(7)(v), App. F, p. 29a). Catalogs and public advertisements both have the same advertising and merchandising purposes, are aimed at the public (or large segments of the public), and are addressed and distributed to specific persons or addresses. Yet the Postal Service discriminatorily classifies addressed public advertisements with one or ten or twenty pages as "letters" while classifying public advertisements with 24 bound pages as non-"letters." This is unreasonable and arbitrary since there are no material differences between short and long public advertisements. It is difficult to see why the binding or number of pages is relevant to determining whether something is a "letter." The "letter" to Aunt Minnie remains a "letter" regardless of its length. Yet a public advertisement—or a slip opinion of this Court—can become a non-"letter" by adding pages and binding. Further, length bears no relationship—much less

a fair and substantial relationship—to the revenue-protection objective of the Private Express Statute.

The majority in the Court of Appeals again upheld the Postal Service's regulation by referring (Opinion at 13-14, App. A, p. 12a) to the opinion of the District Court (440 F. Supp. 1211, 1216 (1977), App. E, p. 26a). In dismissing ATCMU's equal protection claim, the District Court relied on the traditional Congressional exemption of newspapers and periodicals from the postal monopoly to avoid restrictions on the press.

ATCMU does not challenge the exemption of *newspapers*, but rather the arbitrary classification of identical public advertisements as "letters" or non-"letters" based upon whether or not they are delivered with a newspaper. Apart from Judge Wilkey, no one in either court below addressed this point. The same may be said about the exemption of "catalogs." The District Court merely concluded that "[a]t some point catalogs become too large to fit into the *common usage* of the term 'letter'" (*Id.*, emphasis added), without explaining how this is relevant to the purpose of the postal monopoly. Moreover, if the courts below had indeed applied the common usage and meaning of the word "letter," ATCMU would have prevailed.

4. If construed to include public advertisements, the Private Express Statute unconstitutionally violates ATCMU members' First Amendment rights to freedom of speech.

As interpreted by this Court, the First Amendment includes protection of purely commercial advertising. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976), this Court struck down a Virginia statute which prohibited a licensed pharmacist from advertising the prices of prescription drugs. It is important to note that the Virginia statute did not purport to forbid anyone wishing to compare prices at various stores from *receiving* this price information either in person or by phone. 425 U.S. at 782 (Rehnquist, J., dissenting). The statute only banned a particular *method* of making the information available. The analogy to this case is clear—the challenged postal regulation also bans a particular method of making commercial information available to the public.

To be sure, the government has a legitimate interest in protecting the viability of the postal system. However, Congress determined that this goal would be accomplished by prohibiting the private express of "letters". ATCMU in no way seeks to overturn this Congressional judgment. ATCMU merely argues that "letter" should be restricted to its proper meaning—*private* messages. This limited monopoly may be needed to maintain a nationwide system "to bind the nation together through the . . . correspondence of the people" (39 U.S.C. § 101(a)). However, no such justification exists for such a monopoly over public advertisements.

Without the overriding governmental interest which is present in maintaining a monopoly on the delivery of private correspondence, the substantial burdens imposed on commercial free speech by the Postal Service's extension of the monopoly to public advertisements must result in the Constitutional invalidity of the postal regulation in question.

The United States Court of Appeals for the Second Circuit recently held that certain organizations threatened with prosecution under a postal statute for depositing unstamped notices and pamphlets in approved letter boxes of private homes had adequately stated a claim that the statute infringed upon their First Amendment rights. *Council of Greenburgh Civic Associations* v. *USPS*, 586 F.2d 935 (2d Cir. 1978).

In the instant action, the majority of the Court of Appeals found ATCMU's First Amendment claim "without merit." (Opinion at 13-14, App. A, p. 12a). In so finding, the Court of Appeals deferred to the District Court's "careful analysis." In fact, the District Court treated the First Amendment issue in a single paragraph (440 F. Supp. 1211, 1216, App. E, p. 25a), declaring the burden on ATCMU's members to be "speculative" and no different from the burden imposed on any person subject to the Private Express Statute.

The Private Express regulation in question imposes a substantial, nonspeculative restraint on the dissemination of advertising information. The basic rate for bulk third class mail has increased 740 percent since the early 1950's. The sorting requirements for using this rate have been made more onerous and expensive without any compensatory adjustment in the rate. Far from being "speculative," as found in the District Court's cursory analysis, the burden imposed on ATCMU results from the present, continuing effects of *existing* rates and sorting requirements.

Nor is the burden on ATCMU members identical to the burden imposed on others. Defining public advertisements as "letters" hurts small businesses the most, and inhibits business competition. A neighborhood hardware store, for example, may want to have circulars advertising a coming sale delivered by private delivery to its charge account customers in a relatively small geographical area. Unlike a large chain store, such a small retailer is not likely to be able to afford an advertising supplement promoting its sale folded into a newspaper—particularly since the circulation of the newspaper almost certainly is broader than the neighborhood hardware store wishes to reach. This anti-competitive effect of the Postal Service's classification of public advertisements as "letters" is yet another reason for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition is denied, this Court should remand this case to the Court of Appeals to consider the impact of the Court of Appeals' decision on the controversy over whether the postal monopoly applies to "electronic mail."

Respectfully submitted.

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June 7, 1979

Appendices

APPENDIX A

[Notice: The opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 76-1768)

Argued November 20, 1978

Decided March 9, 1979

Before WRIGHT, *Chief Judge*, WILKEY, *Circuit Judge*, and FLANNERY,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* WILKEY.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

WRIGHT, *Chief Judge*: This appeal is from the District Court's grant of summary judgment in favor of the United States Postal Service in a suit challenging the Service's construction of the century-old legislation which establishes and defines the current Government monopoly over the delivery of mail. Appellant, the Associated Third Class Mail Users (ATCMU),[1] asserts that the prohibition against private conveyance or delivery of "letters and packets" in what are known as the Private Express Statutes[2] may not lawfully be applied to delivery of advertising circulars addressed to particular persons or locations.[3]

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[1] The National Mass Retailing Institute (NMRI) appeared as *amicus curiae* in support of appellant.

[2] Like the parties, we use the phrase "Private Express Statutes" to refer to the group of statutes which create the postal monopoly and set forth the conditions under which private persons may carry letters. The central statute at issue in this case is 18 U.S.C. § 1696 (1976), which provides in relevant part:

> § 1696. Private express for letters and packets
>
> (a) Whoever establishes any private express for the conveyance of *letters or packets*, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

(Emphasis added.) Other provisions relating to the postal monopoly are set forth in 18 U.S.C. §§ 1694-1699 (1976) and 39 U.S.C. §§ 601-606 (1976).

The parties are apparently in agreement that the term "packet" means simply a packet of letters and adds nothing of relevance here to the scope of the monopoly. "Letter" thus remains the crucial term.

[3] ATCMU uses the phrase "public advertisements" to describe the materials in suit. The Postal Service and NMRI refer to them as "addressed advertising circulars" or "addressed advertisements." The difference is apparently only semantic. All seem to have in mind the same sorts of materials: advertising flyers or brochures, sealed or unsealed, that are addresssed to particular persons or to the occupants of particular premises. Appellant seeks the option of using private delivery services for these materials.

The Postal Service takes a contrary position.[4] It has determined by regulation that the term "letter" in the statutory proscription encompasses any "message *directed to a specific person or address* and recorded in or on a tangible object"[5]—a definition which clearly includes addressed advertising materials. This litigation turns on the validity of that definition.

The District Court concluded that since the mid-19th century "the Congress, the courts and the Postal Service have all understood the Private Express Statutes to prohibit the private carriage of messages such as [those at suit]." *Associated Third Class Mail Users* v. *United States Postal Service*, 440 F.Supp. 1211, 1216 (D. D.C. 1977). Finding no constitutional infirmity in that interpretation, Judge Parker went on to award summary judgment in favor of the Postal Service and dismiss the complaint. We affirm, relying heavily upon the District Court's thoughtful opinion.

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[4] The National Association of Letter Carriers appeared as an intervenor-appellee.

[5] (Emphasis added.) This definition is contained in the regulations concerning enforcement of the Private Express Statutes. *See* 39 C.F.R. § 310.1(a) (1977). That section goes on to make clear that "[i]dentical messages directed to more than one specific person or address * * * constitute separate letters." 39 C.F.R. § 310.1 (a)(6).

Appellant asserts that promulgation of these regulations, which have the effect of defining the federal crime of transporting letters outside the mails, was beyond the authority of the Postal Service. We disagree. As the District Court observed, *Associated Third Class Mail Users* v. *United States Postal Service*, 440 F.Supp. 1211, 1214 (D. D.C. 1977), the Service is authorized under 39 U.S.C. § 401(2) (1976) to promulgate regulations to further the objectives of Title 39, which includes provisions concerning the postal monopoly. While 18 U.S.C. § 1696—the private express provision at issue here—is not a part of Title 39, its purpose is intimately connected to that title, and it was only separated from the other private express sections in 1909 when the United States criminal laws were codified into Title 18. Accordingly, a fair reading of the rulemaking authority of 39 U.S.C. § 401(2) is that it extends to § 1696.

Our task, and that which faced the District Court before us, is to determine whether the Postal Service's construction of the term "letter" is consistent with the text and history of the Private Express Statutes. For a number of reasons, it is a less than satisfying task. First, our usual tools for statutory construction turn out not to be terribly helpful. Nothing in the phrase "letters and packets" answers the question before us, and the intent of the Congress which enacted that formulation in the course of the 1872 codification of the postal laws is shrouded in obscurity.[6] Moreover, even were the legislative intent less opaque, it might be robbed of currency by the not insubstantial developments of the intervening century. Second, few courts have considered the scope of the postal monopoly or the meaning of "letter."[7] Third, the Postal Service's interpretations and comments regarding the content of the term have often seemed ambiguous

[6] *See* Part I *infra*.

[7] The decision most nearly on point is *Nat'l Ass'n of Letter Carriers* v. *Independent Postal System of America*, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972) (hereinafter cited as *IPSA*). There it was held that unsealed printed Christmas cards sent by businesses to particular persons but bearing no personal message were letters within the meaning of the Private Express Statutes and hence subject to the postal monopoly. The similarities between the materials at suit in *IPSA* and the advertising materials at issue here are obvious.

In *United States* v. *Bromley*, 53 U.S. (12 How.) 88 (1851), the Supreme Court held that an unsealed merchandise order sent to a tobacconist was subject to the postal monopoly and observed that the private express provision was a "revenue law" within the meaning of a statute authorizing Supreme Court review of dispositions of civil actions "brought by the United States for the enforcement of the revenue laws of the United States * * *." 53 U.S. (12 How.) at 96.

Two circuits have recently sustained the general constitutionality of the postal monopoly in decisions involving conceded violations of the statute. *See United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978); *United States* v. *Black*, 569 F.2d 1111 (10th Cir.), *cert. denied*, 435 U.S. 944 (1978). Neither purported to construe the term "letter."

and inconsistent.[8] And fourth, the only policy concern clearly implicated in the quest for the proper scope of the monopoly—the need to shield postal operations from competition so the Postal Service can adopt nonmarket solutions in its effort to further various national goals[9]—is so open-ended and indeterminate that it provides scant guidance. These difficulties do not, of course, obviate the need for decision. But they necessarily color our inquiry and belie any notion that a single definition of "letter" flows ineluctably from the materials at hand.[10]

ATCMU and the National Mass Retailing Institute (which appeared as *amicus curiae* on behalf of appellant) assert that the Postal Service's definition of "letter" must fall because it (1) runs counter to the legislative history, (2) contradicts the weight of administrative authority, (3) is contrary to common sense, and (4) would if sustained lead to constitutional difficulties. We deal with each contention in turn.

I

The statute creating the postal monopoly was first couched in its modern form—as a prohibition against establishment of "any private express for the conveyance

[8] *See* Part II *infra*.

[9] For example, the cross-subsidization inherent in establishment of uniform rates regardless of distance for each class of sealed mail pursuant to 39 U.S.C. § 3623(d) (1976) is inconsistent with a fully competitive market, as is the decision to locate post offices in some out-of-the-way places.

[10] We agree completely with the dissent that "the desired scope of the Postal Service's monopoly * * * is entirely a question of public policy," dissent at 1, and share the view that Congress is the appropriate body to set the nation's policy in this regard. Indeed, we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention. We do not agree, however, that the desirability of a fresh look by Congress, standing alone, would justify a decision overturning the Postal Service's regulations and, by thus leaving matters in limbo, forcing Congress' hand.

of letters or packets"—in Section 228 of the Postal Act of 1872. Act of June 8, 1872, ch. 335, § 228, 17 STAT. 311. The previous statute had referred to conveyance of "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals * * *." Act of March 3, 1845, ch. 43, § 9, 5 STAT. 735. ATCMU argues that the deletion of the "other matter" language reflected a deliberate congressional choice to narrow the postal monopoly, and that by so narrowing it the Congress eliminated any suggestion that it might include addressed advertising materials. As Judge Parker pointed out, however, the legislative history indicates that the 1872 Act was intended to reword and clarify the nation's postal laws *without substantive alteration.* 440 F.Supp. at 1214.[11] ATCMU has been unable to demonstrate that this general intent did not apply with full force to the monopoly provision. And absent some indication that Congress focused on the issue, we are reluctant to find in what purported to be a recodification a deliberate contraction of the postal monopoly.[12] Accord-

[11] *See* Report of the Commissioners to Revise the Statutes of the United States, H.R. Misc. Doc. No. 31, 40th Cong., 3d Sess. 2 (1869).

[12] NMRI argues that the prior statutory language is irrelevant under the principles set forth in *United States* v. *Bowen*, 100 U.S. (10 Otto) 508 (1879), which held that the revised statutes became the law of the land when they took effect on the first day of December 1873 and that resort to prior statutes was improper when the meaning of the language used in the revision was plain. 100 U.S. (10 Otto) at 513. This argument depends, of course, on the contention that the 1872 Act is unambiguous—a contention we find lacking in merit. NMRI relies in part on the sections of that Act concerning the classification of the mail into first, second, and third classes. Those sections provide:

> Sec. 130. That mailable matter shall be divided into three classes: first, letters; second, regular printed matter; third, miscellaneous matter.
>
> Sec. 131. That mailable matter of the first class shall embrace all correspondence, wholly or partly in writing, except book-

ingly, we are of the opinion that the legislative text and history—while not dispositive of either party's contentions—tends to favor the Postal Service.[13]

II

While the legislative history of the Private Express Statutes is quietly obscure, the administrative history is noisily so. Each side is able to point to pronouncements by Postal Solicitors and statements in Service publications which support its view. And each side is able to characterize the pronouncements and statements relied

> manuscripts and corrected proof-sheets passing between authors and publishers.

Act of June 6, 1872, ch. 335, 17 STAT. 300. We do not think these sections convert an otherwise unclear statutory proscription into a clear one. Nothing in either the private express prohibition or the classification provisions suggests that the latter were intended to supply a definition of general applicability or to freeze the content of the postal monopoly. Indeed, §§ 130 and 131 do not purport to define *letter* at all. They merely use the term as an introductory label for a category which they go on to define. The result is not to shed a great deal of light on either the introductory label or the category. We are unwilling to conclude on the basis of these sections that the meaning of the private express provision is so unambiguous as to render resort to the prior statute invalid under *Bowen.*

[13] We do not fully share the District Court's confidence that a broad view of the monopoly is the only one which may fairly be gleaned from the 1872 Act. The District Court was apparently persuaded in part by the argument that to attach substantive import to the deletion in that Act of the "other matter properly transmittable * * * except newspapers, pamphlets, magazines and periodicals" language would as a logical matter lead to the conclusion that Congress meant both to strike "other matter properly transmittable" from the scope of the monopoly and to eliminate the exception for newspapers and the like—thus rendering them subject to the monopoly. *See* 440 F.Supp. at 1214 n.6. We do not think the latter conclusion necessarily follows. Rather, if "newspapers, pamphlets, magazines and periodicals" were within the "other matter properly transmittable" category but not within the term "letter," then the deletion of the "other matter" category would render an exception for newspapers and the like unnecessary. Thus appellant's construction does not as a matter of logic lead to the implausible conclusion that newspapers are subject to the monopoly.

upon by the other as poorly reasoned, ambiguous, or casual.[11] In our judgment, the most that can be said about the administrative history is that it is something of a muddle: no single definition emerges as the obvious choice of past administrators, but neither does there appear any clear ground for setting aside the determination of present ones. The following rough and far from exhaustive sketch illustrates our point.

After the 1872 legislation was adopted there were indications that the Postal Service conceived of the monopoly in somewhat limited terms. In the course of an 1873 opinion which concluded that a package of first class letters was subject to the monopoly whether sent by a private person or a government agency, the Solicitor stated that the Private Express Statutes were intended to prevent "the transmission of mailable matter of the first class (all correspondence wholly or partly in writing) by express or other unlawful means." [15] And notes appended to late 19th century editions of the Postal Laws and Regulations stated that "Congress has not yet, by statute, extended the monopoly of transportation to second, third, or fourth class matter, although admitted to the mails." [16] But these indications are not unambiguous. The language in the Solicitor's opinion was neither directly related to

[14] *See, e.g.*, NMRI's brief at 26-28 (criticizing three 1916 Solicitor's opinions as "poorly reasoned"); appellee's supplemental brief answering NMRI's brief at 16 (asserting that certain testimony of Postmaster General was a "casual explanation").

[15] 1 Opinions of the Solicitor of the Post Office Department (Ops. Sol. POD) 36, 38 (1873). Many of the relevant Solicitors' opinions, as well as excerpts from Postal Laws and Regulations, are reproduced in Appendix A of NMRI's brief.

[16] Postal Laws and Regulations, note following § 705 (1887 ed.). The same language is contained in the note following § 674 of the 1893 edition. The 1879 edition contained a note stating that "[t]he term packet, as used in this and the following sections of the law, is restricted to mailable matter of the first class." Postal Laws and Regulations, note following § 555 (1879 ed.).

the question presented nor by its terms exclusive—it did not say that the monopoly covered *only* what was then included under the rubric of mailable matter of the first class. And the import of the notations in the regulations may be undermined by the fact that the regulations themselves seem at times to have included some third class mailable matter within the term "letter" and to have used the terms "mail-matter" and "letter" interchangeably.[17]

Following these early and concedely somewhat restrictive pronouncements came a number of administrative interpretations that appear difficult to reconcile. On the one hand, three opinions written by the Solicitor in 1916 concluded that the monopoly did extend to addressed circulars of various sorts,[18] a 1933 opinion observed that classification of mail matter into first, second, third, and fourth classes "in no way affects its status under the * * * private express statutes," [19] and the 1934 edition of a Postal Service pamphlet explaining the monopoly stated

[17] All three editions of Postal Laws and Regulations cited in the preceding note listed "circulars" as third class matter but defined them as "printed letter[s]." *See, e.g.*, Postal Laws and Regulations §§ 359, 360 (1887 ed.). The 1879 edition's private express provision first forbids private conveyance of letters and packets and then states, "Nothing herein contained shall be construed as prohibiting any person from receiving and delivering to the nearest post-office or postal car *mail-matter* properly stamped." Postal Laws and Regulations § 555 (1879 ed.) (emphasis added). The 1873 edition of Postal Laws and Regulations also uses the term "mailable matter" in the private express context, *see* § 339, and suggests that circulars may be letters, *see* § 421(11).

[18] 6 Ops. Sol. POD 372, 397, 453 (1916).

[19] 8 Ops. Sol. POD 272, 273 (1933). ATCMU seeks to equate the meaning of "letter" for private express purposes with its meaning when used by Congress to delineate first class matter closed to inspection. As the District Court observed, however, "Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters." 440 F.Supp. at 1214. Therefore, *in pari materia* construction is inappropriate.

that "under the private express statutes the term 'letters' has a broader significance and may embrace circulars." [20] On the other hand, a 1935 opinion concluded that "circulars advertising the goods of a concern for sale" were not letters for purposes of the Private Express Statutes,[21] another in the same year stated that the monopoly did not extend to "[o]rdinary advertising matter, such as handbills or circulars," [22] and language added to the 1937 edition of the pamphlet referred to previously stated that "advertising handbills or circulars" were not within the letter or spirit of the monopoly.[23]

Some of the apparent inconsistencies noted above seem to have been resolved in 1940 when the Postal Service stated in a new edition of its pamphlet explaining the Private Express Statutes that "unaddressed advertising handbills or circulars" were *not* letters, thus setting forth at least by implication the current rule.[24] Nonetheless, appellant and *amicus curiae* argue that the inconsistencies prior to 1940 strip that rule of any foundation and render the Postal Service undeserving of deference in the definition process. The Service counters that the inconsistencies are more imagined than real. It reads those statements which suggest that advertising materials or circulars are not within the ambit of the term "letter" to refer only to *unaddressed* matter and argues that throughout the relevant period the rule was simply that

[20] United States Post Office Department, The Private Express Statutes 4 (1934).

[21] 8 Ops. Sol. POD 425 (1935).

[22] 8 Ops. Sol. POD 469, 470 (1935).

[23] United States Post Office Department, The Private Express Statutes 13-14 (1937).

[24] United States Post Office Department, The Private Express Statutes 14 (3d ed. 1940). NMRI notes quite correctly that the Service did not via this pamphlet explicitly state that addressed circulars were within the monopoly.

addressed circulars were within the monopoly while unaddressed ones were without it. While this was apparently the rule written into the 1940 pamphlet,[25] neither the language of the earlier statements nor the subsequent editorial change renders the Service's reading of pronouncements made in the preceding decades anything more than a plausible conjecture. For present purposes, however, we do not find this conjectural quality to be fatal. Even if the Service's reading is not completely accurate, we do not believe that whatever ambiguity or inconsistency existed is grounds to set aside the rule that is argued for today.

III

We turn now to the ATCMU contention that the Postal Service definition of "letter" as "a message directed to a specific person or address and recorded in or on a tangible object" is arbitrary and contrary to common sense. As we understand it, the primary argument is simply that the inclusion of addressed advertising circulars is so counter-intuitive as to contradict the maxim that one should give effect to the plain and common meaning of the words Congress chose. We find this contention unpersuasive. We have no doubt that the specificity of the addressee is one indicia of the common understanding of "letterness." The dictionary definition which ATCMU would have us adopt [26] is not to the contrary. Webster states that a letter is "a written or printed message intended for the perusal only of the person or organization to whom it is addressed." [27] In our judgment, the materials at suit fit within this formula. Advertising circulars are *intended* for the perusal of the addressees. While ATCMU is doubtless correct that the senders would not

[25] *Id.*

[26] Appellant's brief at 17-18.

[27] Webster's Third New International Dictionary 1298 (1961).

object if others saw the circulars, the key fact is that the sender's goal is to reach the particular persons who have been identified as most likely to be interested in the advertised products. It is for this that the sender pays. His attitude toward the possibility that others might happen across his circulars is beside the point.

More broadly, we note that any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines—they exclude some matters and include others despite similarities between the two classes. We simply conclude today that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrariness which is inevitable.

IV

Appellant's final contention is that the Postal Service's definition runs afoul of the First Amendment and the due process and equal protection clauses of the Constitution. We find these assertions without merit for substantially the reasons relied upon by Judge Parker [28] and see no reason to go beyond his careful analysis.

In sum, we find that the arguments raised by appellant and *amicus curiae* do not warrant invalidation of the definition of "letter" propounded by the Postal Service. For the foregoing reasons, the District Court's judgment is

Affirmed.

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[28] Those reasons are set forth at 440 F.Supp. 1215-1216. In our judgment, this portion of the District Court's opinion deals adequately with our dissenting colleague's concern that the treatment afforded to advertising materials enclosed in newspapers is arbitrary and somehow undermines the entire Postal Service policy. Dissent at 2.

WILKEY, *Circuit Judge, dissenting*: I am in agreement with Judge Wright's recital of the conflicting and shifting ambiguities which have beset both the statutory definition and the Postal Service's interpretation of the word "letter" for the purpose of defining the Postal Service's monopoly. I am in thorough agreement with the statements that "the Postal Service's interpretations and comments regarding the content of the term have often seemed ambiguous and inconsistent," (pp. 5-6) and "the most that can be said about the administrative history is that it is something of a muddle." (P. 9)

I dissent from the court's affirmance of the Postal Service's current interpretation of the word "letter" because, in my reading of the lengthy details back of the majority opinion's terse summary of 150 years of statute and statutory interpretation, there emerges only one consistent theme from the Postal Service—it has always latched onto whatever interpretation of the word "letter" which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.

Not only do I find this total lack of any intellectual consistency offensive, especially when coming from a supposed-to-be responsible government agency, but there is a very practical reason why I think this court should refuse to approve the Postal Service's current interpretation. If we decline to include the advertising flyers which the Postal Service is intent upon embracing within the word "letter" so as to give its monopoly the most expansive scope, we may then force the Postal Service to go to Congress to define accurately the desired postal monopoly scope. That definition, the desired scope of the Postal Service's monopoly, is entirely a question of public policy, properly to be determined solely by Congress, and this court should not countenance the Postal Service's power and revenue grabbing simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure.

On the most important substantive point I do differ with my two colleagues. At the outset the majority opinion points out that the Postal Service "has determined by regulation that the term 'letter' in the statutory proscription encompasses any 'message *directed to a specific person or address* and recorded in or on a tangible object' —a definition which clearly includes addressed advertising materials. This litigation turns on the validity of that definition." (Pp. 3-4) And, my colleagues conclude "that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrarines which is inevitable." (P. 13)

The appellants have strenuously argued—and the majority opinion nowhere mentions or refutes this—that the very advertising circulars or flyers which are the subject matter of the dispute are frequently included as flyers inserted in newspapers which are delivered to specific named addressees at specific residential or business addresses. These flyers or circulars not only have the same text, they are physically the same product of ink and paper, the only difference being that the address in one instance is imprinted on the outside of the newspaper and in the other instance on the envelope containing only the circular or the circular itself. There are numerous examples of this in the record, and we were shown samples at oral argument.

I can see no legal difference in these three instances—name and address printed on the circular itself, on the envelope containing the circular, or on the newspaper containing the circular. Apparently reluctant to take on the powerful press establishment, the Postal Service says it has a monopoly on the first two but not the third. There is no valid distinction, and so the criterion on which my colleagues say this litigation turns, the presence or absence of an address, has no validity whatsoever.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

Appeal from the United States District Court for the District of Columbia.

BEFORE: WRIGHT, Chief Judge, WILKEY, Circuit Judge, and FLANNERY,* United States District Judge for the District of Columbia.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam For the Court.

GEORGE A. FISHER, *Clerk*.

Date: March 9, 1979

Opinion for the Court filed by Chief Judge Wright.

Dissenting opinion filed by Circuit Judge Wilkey.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

[United States Court of Appeals for the District of Columbia Circuit, Filed April 3, 1979, George A. Fisher]

BEFORE: WRIGHT, Chief Judge; WILKEY, Circuit Judge; and FLANNERY*, Judge, United State District Court for the District of Columbia.

ORDER

Upon consideration of the petition for rehearing filed by appellant Associated Third Class Mail Users, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

[United States Court of Appeals for the District of Columbia Circuit, Filed April 3, 1979, George A. Fisher]

BEFORE: WRIGHT, Chief Judge; TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by appellant Associated Third Class Mail Users, having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam.

For the Court:

GEORGE A. FISHER, *Clerk.*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, PLAINTIFF,

v.

UNITED STATES POSTAL SERVICE, ET AL., DEFENDANTS.

[Filed November 29, 1977, James F. Davey, Clerk]

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

The issue presented in this proceeding is whether advertisements directed in identical form to specific persons or residences are validly subject to the United States Postal Service monopoly over letter delivery. Plaintiff Associated Third Class Mail Users ("Mail Users") has brought suit against the United States Postal Service. Mail Users seeks a declaration that 39 C.F.R. § 310.1-.7 (1977), postal regulations enforcing the monopoly, are invalid or unconstitutional either in their entirety or insofar as they define the term "letter" to include such advertisements.[1] Plaintiff additionally seeks an injunction restraining the Postal Service from enforcing these regulations. The National Association of Letter Carriers, the exclusive bargaining representative for all nonsupervisory Postal Service employees in the city letter carrier craft, has been permitted to intervene as a party defendant.

[1] 39 C.F.R. § 310.1(a) provides in relevant part:

> "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:
>
> . . . .
>
> (3) A message is directed to a "specific person or address" when, for example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place.
>
> . . . .

[Footnote continued on page 19a]

This proceeding arises under the postal laws of the United States, 18 U.S.C. § 1696 and 39 U.S.C. §§ 601-606 ("Private Express Statutes"); jurisdiction rests on 39 U.S.C. § 409(a) and 28 U.S.C. § 1339.

There are no material facts in dispute and the parties have filed cross-motions for summary judgment. After consideration of the memoranda of points and authorities, the affidavits and the oral argument of counsel, the Court concludes that the defendants are entitled to judgment and that the complaint of Mail Users should be dismissed.

I.

Mail Users is a District of Columbia trade association consisting of more than 600 organizations which distribute so-called "public advertisements" through the mail at third class rates. Plaintiff's pleading defines such an advertisement to be a "printed message to the public directed in identical form to selected persons or addresses."[2] To avoid increasing postal rates, Mail Users desires to develop a private system of carriage and delivery of "public advertisements."

The current Private Express Statutes and regulations determine the legality of private carriage systems. Title

[1] [Continued]

> (6) Identical messages directed to more than one specific person or address . . . constitute separate letters.
>
> Under subsection (a)(7), telegrams, checks, newspapers, periodicals and books or catalogs of 24 or more bound pages are not considered to be "letters."

[2] Complaint, ¶ 6.

18 U.S.C. § 1696 provides criminal penalties for whoever establishes or uses a private express. The companion civil statute, 39 U.S.C. §§ 601-606, approves private carriage of letters that display the proper amount of postage cancelled in ink and authorizes the Postal Service to search for and seize illegally transported letters. Although the Statutes do not define the term "letter," the Postal Service has defined that word to mean a "message directed to a specific person or address and recorded in or on a tangible object . . . ." and has specified that "[i]dentical messages directed to more than one specific person or address . . . constitute separate letters." [3]

Mail Users readily admits that "public advertisements" are letters under the regulatory scheme and are therefore subject to the postal monopoly. However, plaintiff contests the validity of this outcome, because its members' advertisements are allegedly directed to the public at large rather than being the private communications connoted by the term "letters." Addressing, according to Mail Users, is merely a convenience to direct advertisements to various consumer markets.

Despite plaintiff's representations, addressing is the most important characteristic of "public advertisements." Over 67% of third class mail is addressed to a specific member of a household.[4] While Mail Users members are free to develop a private delivery service for unaddressed advertisements, they have chosen to bring this action instead. Therefore, the focal question here is whether the distinction between addressed and unaddressed circulars under the Private Express Statutes and regulations is valid as a matter of law.

[3] *See* note 1 *supra.*

[4] Affidavit of John R. Wargo, ¶ 12c, Motion of the Postal Service for Summary Judgment.

In support of its motion for summary judgment, Mail Users refers the Court to legislative, judicial and administrative interpretations of the term "letter" in an attempt to prove that the regulatory distinction is invalid. In the alternative, plaintiff argues that the regulations violate its members' constitutional rights to due process, free speech and equal protection of the laws.

II.

As a preliminary matter, the Court notes that, contrary to the plaintiff's assertion, the Postal Service did not act ultra vires in promulgating the private express regulations under 18 U.S.C. § 1696. The service is specifically authorized under 39 U.S.C. § 401(2) to develop regulations to further the private express objectives of Title 39. While section 1696 is not a part of Title 39, that section is a substantive Private Express Statute, separated from the others only when United States criminal provisions were codified into Title 18 in 1909. Therefore, the rulemaking authority of 39 U.S.C. § 401(2) also extends to § 1696.[5]

Plaintiff Mail Users first argues that the Postal Service ignored legislative history in defining the term "letter" to include "public advertisements." This position has little, if any, merit. While the status of such messages in the postal monopoly legislation of the eighteenth and early nineteenth centuries is uncertain, Congress specifically included advertising circulars in 1845 by extending the private express prohibition to letters, packets or "other matter properly transmittable in the United States

[5] This conclusion is supported by § 7 of the Postal Reorganization Act of 1970, P.L. 91-375, 84 Stat. 783, in which Congress ordered the Board of Governors of the Postal Service to conduct a study of the "restrictions on the private carriage of letters and packets contained in Chapter 6 of Title 39 . . . and sections 1694-1696 of Title 18, United States Code, and the *regulations established and administered under these laws.*" (emphasis added)

mail, except newspapers, pamphlets, magazines and periodicals." Act of March 3, 1845, § 9, 5 Stat. 735. In 1872, when Congress redrafted the statute and returned to earlier language prohibiting private express of only letters and packets, Act of June 8, 1872, § 228, 17 Stat. 311, advertisements were not thereby removed from the monopoly because the change was part of a general recodification of the law in 1872 to weed out redundancy. Given that substantive changes in the postal provisions were well-documented, the unheralded change in phrasing in the Private Express Statutes could only have been a simplification.[6] Since the statutes have remained relatively unchanged since 1872, the legislative history shows that communications such as "public advertisements" are still letters for private express purposes.

In a related vein, Mail Users argues that the term "letter" in the private carriage provisions must be read *in pari materia* with that term as used by Congress to indicate first class mail closed to postal inspection. This argument is inappropriate here since Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters. Indeed, in refusing jurisdiction over the Private Express Statutes, the Postal Rate Commission found that Congress has recognized and approved the "dual construction" of the term "letter." [7]

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[6] By this point in time, "letter" presumably had an accepted usage for postal monopoly purposes, since the 1872 Act did not even include the newspaper and periodicals exemption. Ironically, this fact shows that plaintiff's argument here proves too much, since the logic erroneously leads to the conclusion that Congress meant the monopoly in 1872 to cover those traditionally excluded items as well as advertisements.

[7] United States Postal Rate Commission, Statement of General Policy Determining Lack of Jurisdiction and Order Terminating Proceeding 16-19 (Aug. 6, 1976).

Plaintiff's second major argument is that judicial interpretation of the term "letter" would exclude "public advertisements." The case law, however, supports the opposite proposition. In *United States* v. *Bromley*, 53 U.S. (12 How.) 87 (1851), the Supreme Court held that an unsealed order for tobacco was a letter subject to the postal monopoly. In light of the purpose of the monopoly to protect postal revenue, the Court rejected the argument that merchandise orders were not letters, noting that "it may be doubted whether any other subject can be named on which more letters are written and forwarded in the mail." *Id.* at 97. Mail Users attempts to distinguish *Bromley* on the grounds that a merchandise order is more individualized than a "public advertisement." While true, this distinction does not override the *Bromley* economic reasoning, for advertisements today contribute one and a half billion dollars of revenue to the Postal Service per year.

In *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972) (hereinafter cited as *IPSA*), the district court enjoined an independent postal system from delivering addressed and privately stamped Christmas cards to customers of participating businesses, finding that the cards were letters subject to private express prohibitions.[8] Plaintiff's arguments against the precedential value of the *IPSA* case are strained at best. Given that the Independent Postal System restricted its delivery to commercial cards, which are not markedly more private than average advertisements, the two cases are not distinguishable on the basis of the nature of the mail at issue. Plaintiff's assertion that the *IPSA* decision turned on the physical simi-

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[8] Though 39 C.F.R. § 310.1(a) had not yet been promulgated, the Court looked to regulations which defined "letter" in an almost identical way. 39 C.F.R. § 152.2 as retained in an uncodified regulation by 35 Fed. Reg. 19399 (1970).

larity of the proposed independent system to the United States Postal Service lacks merit. While the court did describe similarities such as utilization of uniformed postmen and stamps, the actual decision in no way rests on the physical attributes of competition. Even if *IPSA* did turn on this issue, Mail Users here offers no details of its proposed private delivery service in order to distinguish it from the aborted Independent Postal System of America.

Thirdly, Mail Users argues that the administrative interpretation of the term "letter" has been so inconsistent as to invalidate the regulatory definition. This position cannot withstand legal scrutiny. While the Postal Board of Governors did report to Congress that administration of the Private Express Statutes could be improved,[9] the Court will not suspend the rulemaking authority of the Postal Service on the basis of that announcement alone. Nor will the Court invalidate 39 C.F.R. § 310.1(a) on the basis of an allegedly "illogical flip-flop" by the Service in promulgating the rule. The agency originally proposed to define the term "letter" to include all items but telegrams, and to suspend operation of the Private Express Statutes for newspapers, periodicals, catalogs and checks. In response to comments, the Service rejected the suspension approach to exclude items by definition. This process does not mark inconsistency within the agency, but rather compliance with rulemaking procedure under the Administrative Procedure Act. At any rate, the substantive coverage of the postal monopoly over "public advertisements" was not changed as the rule was promulgated.

As an alternative to the legislative, judicial and administrative history arguments, Mail Users presents several

[9] House Comm. on Post Office and Civil Service, 93rd Cong., 1st Sess., Statutes Restricting Private Carriage of Mail and Their Administration 13 (Comm. Print 1973).

constitutional reasons against inclusion of "public advertisements" in the postal monopoly. All are lacking in merit. Plaintiff claims that the regulations are so arbitrary as to violate its members' Fifth Amendment right to due process, because the "minor inconvenience" of addressing cannot rationally affect whether an advertisement is a letter. Plaintiff itself defeats this reasoning by demonstrating that addressing is crucial to its members' advertising goals.

Second, Mail Users claims that the prohibition of private express for "public advertisements" imposes an impermissible burden on its members' free speech. The restraint plaintiff complains of, however, is no different than that placed on any person subject to the Private Express Statutes, which have long been found constitutional. *Ex Parte Jackson*, 96 U.S. 877 (1878). In *United States* v. *Black*, 418 F. Supp. 378 (D. Kan. 1976), the defendants, who had delivered statements of medical services received to a doctor's patients, contended that if Congress could restrict delivery of letters to the Postal Service, then future postal rate increases could restrict the ability of poor people and small businesses to communicate by mail. The district court dismissed these contentions as being "so speculative and filled with conjecture as to deserve little or no comment." *Id.* at 382. The First Amendment claims of Mail Users in the instant case are no less speculative.

Finally, Mail Users claims that its members have been denied equal protection of the laws because the exclusion of newspaper supplements and addressed catalogs over 24 pages long from a monopoly that includes "public advertisements" bears no relation to the postal revenue goals.[10] However, these members are free to use any type of advertisement to reach potential customers, including

[10] *See* note 1 *supra*.

newspaper supplements and catalogs. At any rate, these classifications are based on reasonable distinctions. Congress has traditionally exempted newspapers and periodicals from the monopoly to avoid restrictions on the press. At some point catalogs become too large to fit into the common usage of the term "letter"; 24 pages, a figure suggested to the Postal Service by Mail Users, is not unreasonable.

III.

From *Bromley* to *IPSA*, the Congress, the courts and the Postal Service have all understood the Private Express Statutes to prohibit the private carriage of messages such as "public advertisements." There is no constitutional infirmity in such an interpretation. Therefore, there being no genuine issue of material fact and the defendants being entitled to judgment as a matter of law, the Court enters summary judgment in favor of defendant United States Postal Service and defendant-intervenor National Association of Letter Carriers and against Associated Third Class Mail Users. An appropriate order will be entered.

Entered: November 29, 1977

BARRINGTON D. PARKER
United States District Judge

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APPENDIX F

Title 39, Code of Federal Regulations

SUBCHAPTER E—RESTRICTIONS ON PRIVATE CARRIAGE OF LETTERS

PART 310—ENFORCEMENT OF THE PRIVATE EXPRESS STATUTES

Sec.

AUTHORITY: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699, 1724.

SOURCE: 39 FR 33211, Sept. 16, 1974, unless otherwise noted.

§ 310.1 Definitions.

(a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

(1) Tangible objects used for letters include, but are not limited to, paper (including paper in sheet or card form), recording disks, and magnetic tapes.

(2) "Message" means any information or intelligence that can be recorded as described in paragraph (a) (4) of this section.

(3) A message is directed to a "specific person or address" when, for example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place.

(4) Methods by which messages are recorded on tangible objects include, but are not limited to, the use of written or printed characters, drawings, holes, or orientations of magnetic particles in a manner having a predetermined significance.

(5) Whether a tangible object bears a message is to be determined on an objective basis without regard to the intended or actual use made of the object sent.

(6) Identical messages directed to more than one specific person or address or separately directed to the same person or address constitute separate letters.

(7) The following are not letters within the meaning of these regulations: [1]

(i) Telegrams.

(ii) Checks, drafts, promissory notes, bonds, other negotiable and non-negotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when shipped to, from, or between financial institutions.

(A) As used above, "checks" and "drafts" include documents intrinsically related to and regularly accompanying the movement of checks or drafts within the banking system. "Checks" do not include materials accompanying the movement of checks to financial institutions from persons who are not financial institutions, or vice versa, except such materials as would qualify under § 310.3(a) if "checks" were treated as cargo. Specifically, for example, "checks" do not include bank statements

[1] Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

sent to depositors showing deposits, debits, and account balances.

(B) As used above, "financial institutions" means:

(1) As to checks and drafts: banks, savings banks, savings and loan institutions, credit unions, and their offices, affiliates, and facilities.

(2) As to other instruments: institutions performing functions involving the bulk generation, clearance, and transfer of such instruments.

(iii) Abstracts of title, mortgages, deeds, leases, articles of incorporation, papers filed in lawsuits or formal quasijudicial proceedings, and orders of court.

(iv) Newspapers and periodicals.

(v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories.

(vi) Identical letters sent in bulk to a single address by a printer or other supplier of letters for third persons.

(vii) Letters sent in bulk to or from storage or to destruction or as part of a household or business relocation.

(b) "Packet" means two or more letters under one cover or otherwise bound together. As used in these regulations, unless the context otherwise requires, "letter" or "letters" includes "packet" or "packets".

(c) "Person" means an individual, corporation, association, partnership, governmental agency, or other legal entity.

(d) "Post routes" are routes on which mail is carried by the Postal Service, and includes post roads as defined in 39 U.S.C. 5003, as follows:

(1) The waters of the United States, during the time the mail is carried thereon;

(2) Railroads or parts of railroads and air routes in operation;

(3) Canals, during the time the mail is carried thereon;

(4) Public roads, highways, and toll roads during the time the mail is carried thereon; and

(5) Letter-carrier routes established for the collection and delivery of mail.

(e) "Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

(f) The "Private Express Statutes" are set forth in 18 U.S.C. 1693-1699 and 1724 and 39 U.S.C. 601-606 (1970).

[39 FR 33211, Sept. 16, 1974; 39 FR 36114, Oct. 8, 1974, as amended at 40 FR 23295, May 29, 1975]

§ 310.2 Unlawful carriage of letters.

(a) It is generally unlawful under the Private Express Statutes for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity. Violation may result in injunction, fine or imprisonment or both and payment of postage lost as a result of the illegal activity (see § 310.5).

(b) Activity described in paragraph (a) of this section is lawful with respect to a letter if—

(1) It is enclosed in an envelope or other suitable cover;

(2) The amount of postage which would have been charged on the letter if it had been sent through the

Postal Service is paid by stamps, or postage meter stamps, on the cover or by other methods approved by the Postal Service;

(3) The name and address of the person for whom the letter is intended appear on the cover;

(4) The cover is so sealed that the letter cannot be taken from it without defacing the cover;

(5) Any stamps on the cover are canceled in ink by the sender; and

(6) The date of the letter, or of its transmission or receipt by the carrier, is endorsed on the cover in ink by the sender or carrier, as appropriate.

(c) The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.

(d) Activity described in paragraph (a) of this section is permitted with respect to letters which—

(1) Relate to some part of the cargo of, or to some article carried at the same time by, the conveyance carrying it (see § 310.3(a));

(2) Are sent by or addressed to the carrier (see § 310.3(b));

(3) Are conveyed or transmitted without compensation (see § 310.3(c));

(4) Are conveyed or transmitted by special messenger employed for the particular occasion only, provided that not more than twenty-five such letters are conveyed or transmitted by such special messenger (see § 310.3(d)); or

(5) Are carried prior or subsequent to mailing (see § 310.3(e)).

§ 310.3 Exceptions.

(a) *Cargo.* The sending or carrying of letters is permissible if they accompany and relate exclusively to some part of the cargo.

(b) *Letters of the carrier.* (1) The sending or carrying of letters is permissible if they are sent by or addressed to the individual carrying them or if they are sent by or addressed to an officer or employee of a carrier on the current business of the carrier (i.e., in his capacity as an officer or employee).

(2) The fact that the individual performing the carriage may be an officer or employee of the carrier for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualification for the exception: the carrying employee is employed for a substantial time, if not full-time (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily in the letter-carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

(c) *Private hands without compensation.* The sending or carrying of letters is permissible if no charge for carriage is made by the carrier. However, a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons.

(d) *Special messenger.* (1) The use of a special messenger employed for the particular occasion only is permissible to transmit letters if not more than twenty-five letters are involved. The permission granted under this exception is restricted to use of messenger service on an infrequent, irregular basis by the sender or addressee of the message.

(2) A special messenger is a person who, at the request of either the sender or the addressee, picks up a letter from the sender's home or place of business and carries it to the addressees home or place of business, but a messenger or carrier operating regularly between fixed points is not a special messenger.

(e) *Carriage prior or subsequent to mailing.* (1) The private sending or carrying of unopened letters which enter the mail stream at some point between their origin and destination is permissible. The origin of a letter is the residence or place of business of the sender; the destination of a letter is the residence or place of business of the addressee.

(2) Examples of permitted activity are the pickup and carriage of letters which are delivered to post offices for mailing; the pickup and carriage of letters at post offices for delivery to addressees; and the bulk shipment of individually addressed letters ultimately carried by the Postal Service.

§ 310.4 Responsibility of carriers.

Private carriers are cautioned to make sure that their carriage of matter is lawful within the definition, exceptions, suspension, and conditions contained in this

part and in Part 320. They should take reasonable measures to inform their customers of the contents of these regulations so that only proper matter is tendered to them for carriage. Carriers should desist from carrying any matter when the form of shipment, identity of sender or recipient, or any other information reasonably accessible to them indicates that matter tendered to them for carriage is not proper under these regulations.

§ 310.5 Payment of postage on violation.

(a) Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.

(b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in Part 959 of this chapter.

(c) Refusal to pay an unappealed demand or a demand that becomes final after appeal will subject the violator to civil suit by the Postal Service to collect the amount equal to postage.

(d) The payment of amounts equal to postage on violation shall in no way limit other actions to enforce the Private Express Statutes by civil or criminal proceedings.

§ 310.6 Advisory opinions.

An advisory opinion on any question arising under this part and Part 320 may be obtained by writing the Assistant General Counsel, Opinions Division, United States

Postal Service, Washington, D.C. 20260. Final opinions will be available for inspection by the public in the Library of the United States Postal Service, and copies of individual opinions may be obtained upon payment of charges for duplicating services.

§ 310.7 Amendment of regulations.

Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

[40 FR 23295, May 29, 1975]